U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company in Chile that sells, services, and installs refrigeration equipment. The U. S. entity was established in 2002 and proposes to be in the refrigeration systems business. The petitioner claims to maintain a parent-subsidiary relationship with the U. S. entity. The petitioner claims seven employees and $30,000.00 in gross annual income. The U. S. entity seeks to employ the beneficiary as an "executive manager" of its new office for a period of three years, at an annual salary of $36,000.00.

The director determined that the evidence was insufficient to establish that (1) there exists a qualifying relationship between the U.S. and foreign entities; (2) the petitioner had secured sufficient physical premises to conduct business; (3) there is sufficient funding or capitalization provided by the foreign entity to commence doing business in the United States; (4) the beneficiary had been employed abroad in a managerial or executive capacity for one continuous year within three years preceding the filing of the petition; and (5) the U. S. entity will be able to support a managerial or executive position within one year of operation.

On appeal, the petitioner disagrees with the director's decision and asserts that the evidence establishes that a qualifying relationship exists between the U. S. and foreign entities; that sufficient physical premises have been obtained to conduct business; that sufficient funding and capitalization has been demonstrated for the commencement of business in the United States; that the U. S. entity will be able to support a managerial or executive position within one year of operation; and that the beneficiary has been employed abroad in a managerial or executive capacity for one continuous year within three years preceding the filing of the petition.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

> *Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The first issue in this proceeding is whether there has been sufficient evidence submitted to establish that a qualifying relationship exists between the U. S. and foreign entities.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define a "qualifying organization" and related terms as:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(*1*) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(*2*) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(*3*) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operation division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

(*1*) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(*2*) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Initially, the petitioner submitted a copy of the foreign entity's Registration of Company, Valparaiso Region, Chile, which stated that the beneficiary was the owner of the foreign company. The petitioner also submitted a copy of the U. S. entity's By-Laws.

The director determined that there had been insufficient evidence submitted to determine the beneficiary's eligibility or proper classification, and subsequently requested additional evidence. The director specifically requested that the petitioner submit copies of stock certificates, stock ledgers, and evidence of the percentage of stock owned by each individual. In response the petitioner submitted the U. S. entity's Articles of Incorporation, which authorized the issuance of 300 shares of stock.

The director determined that the evidence was insufficient to establish that a qualifying relationship existed between the U. S. and foreign entities. The director noted that the foreign entity's Registration of Company

showed that the beneficiary owned that company, but that there had been no documentation submitted in support of the ownership claimed in the U. S. entity's Articles of Incorporation.

On appeal, the petitioner asserts that the U. S. entity is 51 percent owned by the foreign entity and 49 percent owned by the beneficiary. The petitioner resubmits copies of the U. S. entity's Articles of Incorporation, By-Laws, Corporate Registration Certificate, and Employer Identification Number certification.

On reviewing the petition and the evidence, the petitioner has not established that a qualifying relationship exists between the U. S. and foreign entities. The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between U. S. and foreign entities for purposes of a nonimmigrant visa petition. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm. 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).

In the instant matter, the petitioner has not submitted any proof of stock purchase. There has been no tax records, stock certificate registry, purchase of shares agreements, bank statements, wire transfers, canceled checks or any other business documents presented to substantiate the purchase of the U. S. entity's stock. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The second issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that sufficient physical premises have been obtained to conduct business. Initially, the petitioner submitted a copy of a self-storage facility lease agreement for the premises located at [redacted] dated October 26, 2002.

In response to the director's request for additional evidence on this issue, the petitioner submitted a copy of a self-storage facility lease agreement dated January 31, 2003, for the premises located at [redacted] and a copy of a Business Occupancy License issued on March 5, 2003, for the premises known as [redacted] The petitioner asserted that the new self-storage facility is larger than the former self-storage facility leased.

The director determined that insufficient evidence had been submitted to establish that sufficient physical premises had been obtained to house the new office. The director noted that the definition of self-storage indicated that the facility leased by the petitioner was for the purpose of storage only, and not for the purpose of conducting business.

On appeal, the petitioner submitted a copy of a standard month-to-month lease agreement for the premises known as [redacted] The lease agreement was entered into by [redacted] and the U. S. entity, and was dated to commence on April 23, 2003 and terminate on May 23, 2003. The petitioner resubmitted a copy of the self-storage facility lease dated January 31, 2003. The petitioner describes the former lease agreement as a "corporate office lease" and the latter as an "office warehouse lease."

The evidence submitted by the petitioner is insufficient to demonstrate that sufficient physical premises have been secured to conduct business. It is noted for the record that this petition was filed on October 30, 2002. It is also noted that the 2nd self-storage facility lease is dated January 31, 2003, and the lease agreement submitted on appeal is dated April 23, 2003. The petitioner has not shown that a self-storage facility is sufficient physical premises for a refrigeration systems business.

CIS regulations at 8 C.F.R. § 103.2(b)(12) state, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts, *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Citizenship and Immigration Services (CIS) cannot consider facts that come into being only subsequent to the filing of a petition. *See Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981). A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm. 1998). Furthermore, the address contained on the business occupancy license differs from any address contained in the lease agreements submitted. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The third issue in this proceeding is whether the petitioner has established that sufficient funding or capitalization to commence doing business in the United States has been provided by the foreign entity. The petitioner submitted copies of ATM withdrawal receipts as evidence of funding and capitalization. The director determined that such evidence was insufficient to demonstrate that the U. S. entity has been sufficiently funded or capitalized by the foreign entity to commence doing business. On appeal, the petitioner submits financial position statements for the foreign entity, a receipt, and a statement of Chilean assets. The petitioner has failed to submit sufficient evidence to demonstrate that adequate funding and capitalization has been provided by the foreign entity to commence doing business in the United States.

The fourth issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary was employed by the foreign entity primarily in a managerial or executive capacity for one continuous year within the three years preceding the filing of the petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily—
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> (i) Manages the organization, or a department, subdivision, function, or component of the organization;
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> (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily—
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> (i) Directs the management of the organization or a major component or function of the organization;
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> (ii) Establishes the goals and policies of the organization, component, or function;
>
> (iii) Exercises wide latitude in discretionary decision-making; and
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> (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner indicated that the beneficiary's past duties consisted of managing, directing, and coordinating activities in the sales, marketing, and service departments. In a letter of support dated October 2002, the petitioner stated that the beneficiary has been employed as president of the foreign entity since 1993. It is also stated that the beneficiary directed the company and was responsible for all negotiations, contracts and purchases. The beneficiary is also described as having control of financial matters and the day-to-day operations of the foreign business. The petitioner submitted a copy of the foreign entity's organizational chart and payroll registers for September and October of 2002. The organizational chart listing included: "president," "general manager," "subsidiary U.S.A. executive manager," "administration," "marketing," "service," "sales marketing," "finances," "sales," "shipping," "human resources," and "service."

There has been insufficient evidence submitted to establish that the beneficiary was employed by the foreign entity for one continuous year within three years preceding the filing of the petition in a managerial or executive capacity. There has been no independent documentary evidence submitted to substantiate the personnel structure depicted in the foreign entity's organizational chart. Although specifically requested by the director, the petitioner failed to submit a copy of the organization's payroll register for the month of November 2002. There is no evidence to show that the beneficiary supervised a subordinate staff of professional, managerial, or supervisory personnel who relieved him from performing non-qualifying duties. Furthermore, the petitioner's evidence is not sufficient in establishing that the beneficiary directed the management of the organization or a major component or function of the organization; established the goals

and policies of the organization; exercised wide latitude in discretionary decision-making; and received only general supervision or direction from higher-level executives. Rather than the beneficiary functioning at a senior level within the organizational hierarchy, it appears from the record that he performed the functions of the organization and carried out the day-to-day services of the business. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International,* 19 I&N Dec. 593, 604 (Comm. 1988).

The fifth issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the U. S. entity would be able to support a managerial or executive position within one year of operation.

The petitioner submitted a business plan for the U. S. entity. In the business plan it is stated that the U. S. entity would be in the business of selling, consulting, and marketing refrigeration systems. It is also stated that the company "plans to offer quality control, business development, assistance, performance management, customer service, and delivery of the equipment or/and parts any where [sic] in the country and out of the country." The petitioner in its business plan indicates its intention to expand its business throughout Florida and other parts of the United States. It is also indicated in the business plan that the company contemplates initially employing three employees, one in a managerial capacity and two as sales representatives.

The record does not demonstrate that the U. S. entity will contain the organizational complexity to support the proposed managerial or executive staff position within one year of operation. The petitioner failed to adequately respond to the director's specific request for a business plan that shows in detail how the new business will be fully operational within one year, with employees in place, and doing business by providing a product or service. The business plan submitted by the petitioner fails to detail accurate, realistic projections to establish that the U. S. entity will realize growth within one year sufficient to support a managerial or executive position. Although the evidence demonstrates that the petitioner intends to hire new employees it has not provided detailed position descriptions to show that they will be employed in other than non-professional positions. The business plan is not supported by independent documentary evidence that would show that its projections and assertions are adequate. There has been no evidence presented that details the time frame in which each new employee will be hired, what the new employee's duties will consist of, or how the beneficiary's duties will interrelate with that of the new hires.

In review of the entire record, the petitioner has failed to present sufficient evidence to establish that there exists a qualifying relationship between the U. S. and foreign entities; that the petitioner has secured sufficient physical premises to conduct business; that the foreign entity has provided sufficient funding or capitalization to commence doing business in the United States; that the beneficiary had been employed abroad in a managerial or executive capacity for one continuous year within three years preceding the filing of the petition; or that the U. S. entity will be able to support a managerial or executive position within one year of operation.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.